Supreme Court, U.S.
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No. 98-1229

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JIMMY BOYD,

Petitioner,

v.

STATE FARM INSURANCE COMPANIES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE AFFILIATIONS

The petition lists "State Farm Insurance Companies" as respondent in this proceeding. There is no legal entity named "State Farm Insurance Companies." Petitioner was employed by State Farm Mutual Automobile Insurance Company, which was the entity that appeared both as the defendant in the trial court and as the Appellee in the Court of Appeals, and it is State Farm Mutual Automobile Insurance Company that is appearing as Respondent in this proceeding.

Respondent, State Farm Mutual Automobile Insurance Company, has no parent company and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The Petitioner was employed with Respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), beginning in 1990, in the Administrative Services Department. He was hired by Bruce Sutton, his eventual supervisor, who selected him over a Caucasian applicant. Mr. Sutton was Petitioner's direct supervisor for most of his tenure at State Farm, and awarded him numerous raises and promotions, which were approved by Terry Vice, the manager of the department. In June of 1995, the Petitioner submitted a written request to Mr. Sutton for a promotion from his current title of Supervisor III to Supervisor IV. However, Petitioner's most recent performance evaluation, administered to him in December of 1994, reflected that the Petitioner had achieved only seven (7) of the ten (10) goals which he, Mr. Vice, and Mr. Sutton had agreed upon the preceding year. For that reason, Mr. Vice and Mr. Sutton concluded that the Petitioner had not yet achieved a level of work performance that would justify promotion to Supervisor IV.

During August of 1995, Petitioner obtained State Farm's FMLA booklet and acquainted himself with the policies contained therein. The booklet states that medical certification for FMLA leave is automatically required for leave requests that exceed five (5) days. Petitioner admitted that, after reviewing the FMLA booklet, he was aware that State Farm had the right to request medical certification, and to deny FMLA leave, where proper medical certification was not provided. On August 8, 1995, Petitioner submitted a request for FMLA leave and simply stopped coming to work. Over the course of the next month, Darren Thomas and Gay Labutis, who worked in the Human Resources and Medical Departments, respectively, contacted Petitioner numerous times requesting proper medical certification that Petitioner was incapacitated and indicating a

probable duration for his leave. The Petitioner kept detailed records of these telephone conversations, including the precise nature of State Farm's requests for certification. In response to those requests, the Petitioner sent State Farm two (2) notes from his psychological care providers — Dr. John Pascoe and David Colley. However, neither of these letters in any way indicated that the Petitioner was unable to work or gave a probable duration for his leave from work.[1] Each time the Petitioner sent one of these insufficient letters to State Farm, either Mr. Thomas or Ms. Labutis contacted him and informed him that his absence from work was still not supported by proper medical certification, and that he needed to return to work immediately.

On September 6, 1995, almost one month after Petitioner stopped coming to work, State Farm sent him a letter, notifying him that he had been classified as Absent Without Official Leave ("AWOL"), due to his failure to provide proper certification. The letter also requested medical certification from him one last time. Mr. Thomas also communicated this to the Petitioner in a telephone conversation on September 8, 1995, which was documented in detail by the Petitioner. In response to these last two requests, the Petitioner sent State Farm one more note from Mr. Colley, dated September 11, 1995. However, as before, this note did not in any way indicate a medical need for the Petitioner to remain absent from work. Therefore, on September 15, 1995, after the Petitioner had been absent from work for a total of five weeks, State Farm terminated his employment on the grounds that he had been classified as AWOL for ten days.

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1. In their depositions, both Dr. Pascoe and Mr. Colley testified that they did *not* consider the Petitioner to be incapacitated from working, which explains why none of the notes they wrote on his behalf contained any statements to that effect.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for *certiorari* for the following reasons:

I.

RESOLUTION OF THE PETITIONER'S QUESTION REGARDING THE FIFTEEN-DAY NOTICE PROVISION CONTAINED IN THE FMLA REGULATIONS WOULD NOT AFFECT THE OUTCOME OF THIS CASE.

The first question presented by Petitioner is whether the Court of Appeals properly interpreted the FMLA regulation which requires employers to give employees fifteen days to provide proper medical certification for an FMLA leave of absence. However, that particular issue, as phrased by Petitioner, did not even control the outcome of the appeal, because the Court of Appeals already had determined that the Petitioner did not suffer from a "serious health condition" at the time he requested leave and, therefore, was not entitled to protection under the FMLA.

The FMLA itself provides that an employee is only entitled to FMLA leave for himself "because of a serious health condition *that makes the employee unable to perform the functions of the positions of such employee*." 29 U.S.C. § 2612(a)(1)(D) (1995) (emphasis added). The FMLA regulations further explain that, in order to be entitled to FMLA leave, an employee must suffer from a "period of incapacity," which renders the employee unable to "work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore or recovery therefrom." 29 C.F.R. § 825.114(a)(2)(i). Every court that has reached this issue has either expressly or impliedly required a showing of incapacity

in order for an employee to be entitled to FMLA leave. *Murray v. Red Kap Indus., Inc.*, 124 F.3d 695, 698 (5th Cir. 1997); *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123 (8th Cir. 1997).[2] Petitioner's own doctor and psychotherapist testified that he was not incapacitated from working at the time that he requested leave from work. On those grounds, the Circuit Court, following unanimous holdings across the country to this effect, held that the Petitioner was not entitled to FMLA leave and upheld dismissal of Petitioner's FMLA claim on those grounds. Therefore, review of the question presented by Petitioner regarding the fifteen-day notice provision in the regulations would not even have the potential to alter the outcome of the case and *certiorari* should be denied.

The Petitioner apparently also takes issue (without presenting a question for review) with the Fifth Circuit's holding that the District Court did not commit manifest error in rejecting the affidavit of Petitioner's expert, Dr. Emerson Emory, which was submitted in an attempt to rebut Dr. Pascoe's and Mr. Colley's testimony that he was not incapacitated from working. The District Court rejected the affidavit on the grounds that it was vague, conclusory, and replete with legal terms of art. As the Petitioner concedes, Rule 56(e) of the Federal Rules

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2. *See also Stoops v. One-Call Communications, Inc.*, 141 F.3d 309 (7th Cir. 1998); *Price v. Marathon Cheese Corp.*, 119 F.3d 330 (5th Cir. 1997); *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 106 (D.R.I. 1997); *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 299 (S.D.N.Y. 1997); *Rhoads v. FDIC*, 956 F. Supp. 1239, 1255 (D.Md. 1997); *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988, 997-98 (N.D.Ga. 1996); *George v. Associated Stationers*, 932 F. Supp. 1012, 1015-16 (N.D. Ohio 1996); *Hott v. VDO Yazaki, Corp.*, 922 F. Supp. 1114, 1128 (W.D. Va. 1996); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474-76 (D. Kan. 1996); *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310-11 (E.D.Ky. 1996); *Brannon v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036-37 (M.D.Tenn. 1995); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 243 (E.D.Pa. 1994).

of the Civil Procedure requires that affidavits submitted in response to a motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." The Petitioner would have this Court grant *certiorari* to second-guess the Circuit Court's application of this Federal Rule of Civil Procedure. Under this Court's rules, "[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Rules of the Supreme Court of the United States*, Rule 10 (1997). *See also Appalachian Power Co. v. American Inst. of Certified Public Accountants*, 80 S. Ct. 16, 18, 4 L. Ed. 2d 30, 32 (1959). Dr. Emory's affidavit was the only evidence presented by Petitioner in response to the testimony of Dr. Pascoe and Mr. Colley that he was not incapacitated from working, and the District Court properly disregarded that evidence. Therefore, the summary judgment evidence established that Petitioner was never entitled to FMLA leave in the first place, and resolution of the presented question regarding the fifteen-day waiting period for medical certification would not affect the outcome in this case. Accordingly, this Court should deny the Petition for Writ of *Certiorari*.

II.

REVIEW OF THE FMLA NOTICE PROVISIONS IS NOT NECESSARY BECAUSE THE CIRCUIT COURT INTERPRETED THEM CORRECTLY AND, IN THE ALTERNATIVE, THE ISSUE IS NOT RIPE FOR DECISION BY THIS COURT.

The Petitioner takes issue with the Circuit Court's interpretation of the notice provisions contained in the FMLA regulations. The specific regulations at issue deal with the inter-relationship between the notice required to be given to

employees regarding the need for medical certification and the employer's rights when such a certification is not forthcoming from the employee. Petitioner carefully parses several of the regulations to argue that State Farm's notification to him that medical certification was required was insufficient. However, the Circuit Court's decision was based upon a common sense reading of the regulations as requiring actual, sufficient notice to the employee, in whatever form, of the need for medical certification. Moreover, there is no dispute that, just days prior to requesting leave, Petitioner read State Farm's FMLA booklet and understood that State Farm required medical certification for every leave request like his. Furthermore, Petitioner's handwritten notes and deposition testimony establish State Farm's exhaustive efforts to obtain proper medical certification from him, and the content of those handwritten notes (reciting the substance of the conversations) establishes that the Petitioner *understood* what was being requested of him. Based upon that undisputed evidence, the Court determined that the Petitioner had received *actual* (and abundant) notice of his obligation to provide proper medical certification for his leave request. This holding in no way contravenes the letter, or the intent, of the FMLA and, therefore, review by this Court is not necessary.

The Petitioner also takes issue with the Circuit Court's holding that, once an employee has responded to a written request for medical certification, the regulation providing for fifteen days in which to submit that certification is no longer implicated. The fallacy in Petitioner's logic is that he confuses the *duty* of the employer to give the employee 15 days to provide the required certification with the *right* of the employer to base subsequent actions on the nature of the certification provided. In this case, the certification was insufficient to support a request for FMLA leave, and the employer's decision to terminate Petitioner's employment because he was AWOL was

clearly lawful. The passage of five days' additional time would confer no greater status on the certification than it possessed upon receipt by State Farm, and the argument that the 15 days permitted to submit the certification bars the employer from taking action once it has been received is non-sensical and should be disregarded by this Court.

Petitioner has presented no authority to support his interpretation of the regulation. By way of contrast, the one case from another circuit which deals with an analogous situation is in accord with the decision of the Court of Appeals in this case. In *Dillon v. Carlton*, 977 F. Supp. 1155 (M.D. Fla. 1997), the plaintiff requested FMLA leave, to commence two weeks from the date of the request. The employer did not request medical certification until three days before the leave was to commence, and the plaintiff submitted the certification on the day she planned to begin her leave. The plaintiff complained that the employer had violated the FMLA regulation requiring a request for certification to be made "within two business days" after the leave request. The court held, however, that since the plaintiff had been able to submit the certification prior to commencement of her leave, the regulation at issue was moot. The Petitioner failed to demonstrate a split in the circuit courts on this issue, and the only other similar decision to date is in accord with the decision of the Circuit Court. The petition for *certiorari* should be denied.

III.

THE PETITIONER'S RACE DISCRIMINATION CLAIM WAS PROPERLY DISMISSED AND SHOULD NOT BE REVIEWED BY THIS COURT.

The petition for *certiorari* presents a truly "one-sided" synopsis of the summary judgment evidence regarding the

Petitioner's race discrimination claim. In fact, the Petitioner's brief ignores the entire grounds upon which the Circuit Court affirmed summary judgment on that claim. For example, the Petitioner points out two alleged racist comments by Bruce Sutton, but fails to point out that both comments allegedly were made more than one year prior to the denial of Petitioners' request for a promotion, and were in no way related to his employment with State Farm. It was on these grounds that the Court found those two alleged comments to be "stray remarks," which have been recognized by this Court as simply not being probative of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). Similarly, Petitioner fails to point out that Mr. Sutton (the alleged discriminator) actually hired him in the first place which, in most circuits, gives rise to an inference of no discrimination.[3]

With regard to the claim for discriminatory termination, the Petitioner fails to point out that the undisputed summary judgment evidence proves that Bruce Sutton — the only individual for whom the Petitioner alleged any discriminatory animus — was not even involved in the decision to terminate his employment. In short, the petition for *certiorari* in no way addresses the evidentiary grounds for the Circuit Court's affirmation of summary judgment on the Petitioner's discrimination claim. Furthermore, this Courts' own rules provide that granting *certiorari* is rarely proper when the asserted error "consists of erroneous factual findings or the

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3. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir. 1998); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995); *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993); *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992); *Proud v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991).

misapplication of a properly stated rule of law." *Rules of the Supreme Court of the United States*, Rule 11 (1997). *See also N.L.R.B. v. Waterman S.S. Corp.*, 309 U.S. 206-208, 60 S. Ct. 496, 495, 84 L. Ed. 704, 706 (1939). Therefore, the issues presented by the Petitioner regarding his claims of race discrimination are not proper for review by this Court and the Petition for Writ of *Certiorari* should be denied.

CONCLUSION

For the reasons given above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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